Supreme Court, U.S.
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No. 86-859

In the Supreme Court of the United States

OCTOBER TERM, 1986

LAWRENCE J. KOVAC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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The United States argues (Mem. in Opp. 3-4) that "the decision in this case does not conflict with this Court's decision in *Miller v. United States*," 357 U.S. 301 (1958), on the grounds that (1) *Miller* "may no longer be valid, in light of *Elkins*" *v. United States*, 364 U.S. 206 (1960), and (2) in any event, the rule of *Miller* "has never been extended to determine the lawfulness of searches." A sound analysis of the decisions in *Miller* and *Elkins*, however, shows that (1) *Miller* applies to seizures of evidence under state authority, and (2) the validity of *Miller* was unaffected by *Elkins*.

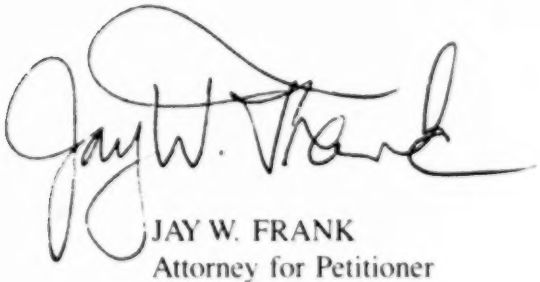
1. The Court in *Miller* held that evidence seized at the time of an arrest authorized solely by state law must be suppressed in a federal criminal trial if the arrest violated state law. That holding requires that evidence seized under the sole authority of a state search warrant issued by a state court judge to a state police officer must be suppressed in a federal criminal trial if the warrant was invalid under state law. The United States recognizes (Mem. in Opp. 4 n.2) that its proposed distinction between seizures under the authority of arrests and seizures under the authority of search warrants is unsatisfactory.

2. The Court in *Elkins* held that evidence seized by state officers must be suppressed in a federal criminal trial if the seizure violated

the Fourth Amendment. The assertion by the United States (Mem. in Opp. 4 n.2) that *Elkins* is inconsistent with *Miller* is without foundation. The two decisions, taken together, state the rule that evidence seized under state authority must be suppressed in a federal criminal trial if the seizure or the exercise of authority violated state or federal law. As this Court stated in *Elkins*, 364 U.S. at 221, "when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it . . . frustrates state policy".

The petition for a writ of certiorari should be granted.

Respectfully submitted,
MOULE & FRANK, Lawyers



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